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Nos. 98-1513 and 98-1526

Supreme Court, U.S.
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In The

Supreme Court of the United States

REDBUD COMMUNITY HOSPITAL,
ADVENTIST HEALTH, INC.,

vs. *Petitioners,*

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, DAVID BURROWS, RHODA THOMAS,

Respondents,

and

WOLFGANG SCHUG, M.D.,

vs. *Petitioner,*

DAVID BURROWS, successor-in-interest to Cody Burrows, deceased; DAVID BURROWS and RHODA THOMAS individually and as heirs and surviving parents of Cody Burrows,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO BOTH PETITIONS FOR WRITS OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The district court issued an interlocutory discovery order for production of hospital records, names of witnesses, and other evidence that petitioners wish to conceal. The court effectively denied petitioner Schug's request to certify the order for immediate appeal pursuant to 28 U.S.C. Sec. 1292. The order as to documents was directed not to Schug, but only to the hospital petitioners, because only they had custody of the supposedly privileged materials.

Petitioner Schug nevertheless filed a purported appeal as of right, ignoring the general rule against uncertified interlocutory appeals in civil cases. The appeal was, therefore, summarily dismissed based on controlling Ninth Circuit authority, which is consistent with Supreme Court and other circuits' authority, that parties to a civil case may not have automatic interlocutory appeals of discovery orders, unlike third-party witnesses served with grand jury subpoenas.

Both Schug's and the Hospitals' separate petitions for writs of mandamus also were summarily denied by the 9th Circuit, based on authority in that Circuit, which again is consistent with authority of the U.S. Supreme Court, that mandamus will not lie unless the district court abused its discretion by issuing a clearly erroneous ruling. Accordingly, the Ninth Circuit's rulings on both the appeal and the mandamus petitions were contained in a single one-page, unpublished order.

Based on this history, the *actual* questions presented, which would have to be decided favorably to petitioners

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

before this Court could consider the questions of substantive "privilege" law they present, are:

(1) Should the Court of Appeals for the Ninth Circuit have issued a writ of mandamus to overturn an interlocutory district court civil discovery order on the ground of a purported state (not federal) law medical peer review "privilege," where no showing was made that the order was clearly erroneous and hence an abuse of discretion, in light of the admissions in the briefs below and in both petitions here that applicability of this state "privilege" under federal law has been rejected by numerous federal courts and thus is at best a debatable proposition?

(2) Does a party in civil litigation who claims he would be irreparably harmed by release of documents held by another party in the case have the right to automatic interlocutory appeal, after being denied discretionary leave to appeal, to challenge the discovery order on the ground that the materials are "privileged"?

Respondents submit that the answers to both questions are well settled in the negative and are unworthy of review by this Court. First, petitioners do not come even close to meeting the high standard for the extraordinary remedy of mandamus. Second, the purported interlocutory appeal is conclusively barred by longstanding statute, case law, and judicial policy.

Respondents submit that the petitions should be summarily denied on that basis and that the tendentious questions posed by petitioners cannot and need not be

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

reached given the procedural posture of this interlocutory proceeding.

Moreover, the questions in both petitions as to whether the purported privilege should apply to respondents' state law claims for medical malpractice as well as to their federal claims for EMTALA violations are red herrings. The district court's order pertains solely to discovery of the records from the hospital and does not reach the admissibility of the records in the trial of the state or federal law claims; thus it is not accurately described as a ruling on "privilege" at all. As only release is at issue, it would make absolutely no difference at this stage whether this case contained only the federal EMTALA claim or, as it does, both state law and federal claims. In either event, the only two possible outcomes are that the records are either released to respondents or they remain concealed.

PARTIES TO THE PROCEEDINGS

The two petitions accurately list the parties to the proceedings.

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I.

COUNTER-STATEMENT OF THE CASE

The petitions should be denied because, very simply, this is the wrong case for the United States Supreme Court to consider what might otherwise be interesting questions of privilege law (or, more accurately, of civil discovery law). There are three decisive reasons for this.

(1) Petitioners fail to appreciate, or at least to point out for this Court, that the interlocutory nature of the challenged discovery order is fatal to their campaign for appellate review. It is no accident that the Ninth Circuit, after full briefing and oral argument, issued an *unpublished* order summarily denying both the Hospitals' and Dr. Schug's petitions for mandamus and summarily dismissing Dr. Schug's separate appeal. There is no reason to believe the Ninth Circuit failed to understand from the lengthy briefs (two rounds per side) and oral argument that the issues presented were of *potentially* significant legal interest. But that Court, like this Court, is not inclined to ignore equally important legal doctrines that bar the type of piecemeal, interlocutory delay of civil case discovery orders that these petitioners have so far created.

Thus, the Ninth Circuit summarily disposed of this matter because the separate appeal was barred under clear authority against the very type of interlocutory derailment of ongoing civil litigation Dr. Schug improperly perpetrated by filing it, and has exacerbated by bringing to this Court. And the mandamus petitions were flawed because petitioners' presentation to the Ninth Circuit, like the one they make here, proved that the district

court could not have abused its discretion — needed to justify reversal by that extraordinary writ — because the existence of the purported privilege under federal law was, at best, debatable.

(2) This also is the wrong case *on the facts* for the seminal review of federal privilege (or discovery) law that petitioners want this Court to undertake. They present the case as though it involved nothing more than a discovery attempt by respondents, approved by the district court, to strike at California's protection for doctors to express their candid opinions of medical services rendered by other doctors, or even for an accused doctor to be candid about his own work. But that is *not* the thrust of respondents' discovery effort and that was *not* the fact situation as it appeared to the district court.

Rather, the district court did *not* rule that respondents are entitled to the so-called peer review documents, witness names, and other information because it thought plaintiffs in *every* case ought to be allowed to see what other doctors thought of a defendant doctor's work. Rather, the court based its decision on evidence that the peer review process had been corrupted by misconduct separate from the underlying EMTALA violations or medical malpractice Dr. Schug committed. The hospital petitioners, though not petitioner Schug, note this in passing (at p. 6 of Hospitals' petition), but breezily dismiss it.

But these facts, as the district court itself said, were crucial to its decision because the apparent corruption within the peer review process itself brings this case closer to numerous federal cases, including antitrust and

employment discrimination complaints, as well as California state cases involving alleged criminal violations, where the state privilege has been overridden due to similar process corruption facts. Such cases, like this one, are quite unlike petitioners' model of doctors being forced to reveal what they said about other doctors. That is, respondents are not seeking opinions, but rather facts, documents and the identity of witnesses that would prove the process was corrupted.

Respondents contend that principal defendant Schug, perhaps aided and abetted by others at the Hospital, violated the California Penal Code by fraudulently creating a false medical record to cover up gross misconduct. Schug indeed admitted under oath the bizarre act of burning his original notes in a bonfire at his home. Such violation of law would not entitle the hospital to the privilege even under California state law, contrary to petitioners' false assertion that it is "undisputed" the state privilege would bar the discovery if there were no federal claims in this case. And even if there were no criminal violation, proof of such independent spoliation of evidence would also arguably eliminate the state privilege, even if state law instead of federal law were to apply.

The district court thus wrote: "[T]o the extent plaintiffs allege that Dr. Schug may have been instructed to create the [false] addendum and burn his notes at the peer review meeting, plaintiff's claims for spoliation of evidence *and EMTALA* depend on communications made during the peer review proceedings. Thus, this case is more like the antitrust cases than medical malpractice cases, since part of the claims arise out of peer review meetings." Hospital Pet. App. 16 (emphasis added).

Although the Hospital petitioners do quote this passage in their brief, they give it a misleading spin by immediately adding that the district court "did not state why it would not delay discovery until plaintiffs explained in greater detail how the Hospital's peer review process was involved in the claims plaintiffs were asserting, nor did it say why it would not conduct an *in camera* review of the documents." Hospital Pet. 6.

But respondents provided the district court as much explanation as they could — without actually seeing the withheld evidence — of how the Hospital's peer review process apparently was corrupted. Whether the district court needed to make an *in camera* review of the concealed evidence is within that court's zone of discretion and surely cannot be an appropriate matter for review by the United States Supreme Court. The discovery record in this case already includes at least 25 depositions, four volumes of grand jury testimony in criminal proceedings against Dr. Schug, and hundreds of documents that contain thousands of pages. All this material was available to the district court prior to its determination that respondents had presented a sufficiently plausible allegation of direct corruption of the peer review process to justify discovery of relevant records, and some of it was reviewed by that court.

It borders on the absurd for petitioners to invite the United States Supreme Court to intervene, on an *interlocutory* basis in this civil proceeding, to upset the district court's determination of whether and to what extent this evidence supports the discovery sought by respondents under the well-recognized exception, even when a state privilege is otherwise applicable, for situations where the

peer review process is, itself, corrupt or otherwise implicated in the predicate facts of the case.

(3) Both petitions present a purported legal question that was not the primary basis for the district court's decision. That question, therefore, is not properly before this Court. That is, even if this Court were to accept it for review and decide it favorably to petitioners, the district court's ruling would still have to stand based on that court's primary — and independent — ground for decision.

Petitioners argue that this case presents a proper vehicle for decision of a question purportedly left open by this Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), which they describe as being whether "state law claims that are pendent to federal question cases are governed by federal privilege law." Hospital Pet. 11 (quoting Hosp. Pet. App. 14). The district court did opine that respondents' state law claims against Dr. Schug and the Hospital would be "governed" by federal privilege law.

But that opinion was presented by the district court merely as an *alternative* ground for its ruling "assuming arguendo that the [peer review] evidence was relevant only to the [state law] spoliation claim." (Hospital Pet. App. 14.) Both petitioners overlook, however, that the court had just given its *primary* ground for decision that rendered the alternative ground mere surplusage:

> "Defendants first argue that plaintiff's request for the peer review records only applies to the state law claim of spoliation, and thus state privilege law should apply to this claim. However, defendants' arguments fail for two reasons. First, plaintiffs contend that that the

> records are relevant because the defendants, and other unknown persons who may be members of the Peer Review committee, conspired to alter, destroy, and falsify Cody [Burrows'] medical records with regard to the care and treatment he received during his stay at Redbud [Hospital]. *This contention is common to all causes of action, including the federal cause of action under EMTALA. As such federal privilege law governs."* (Hospital Pet. App. 14, emphasis added.)

That ruling alone is sufficient to justify the district court's order granting respondents discovery of the alleged peer review information. Nothing the court went on to gratuitously add "arguendo" about purported applicability of the privilege to the state law claims can add or subtract anything from the adequate basis for that ruling. Even if there were no state law claims in this case at all, the district court's discovery order would stand on its own purely federal law foundation based on that court's study of the facts of this case which is inappropriate for interlocutory review by the Supreme Court.

Moreover, the district court's "arguendo" separate ground refers to the information's potential relevance to state law spoliation claims, but not to the separate state law claims for medical malpractice. But as Petitioner Schug mentions in passing in a footnote not linked to discussion of the purported *Jaffee v. Redmond* issue, the state law spoliation claim no longer exists. On May 11, 1998, just six days after the district court's opinion just quoted, the California Supreme Court abolished that as a valid state law cause of action. *Cedars-Sinai Medical Center v. Superior Court (Bowyer)*, 18 Cal.4th 1, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998), cited in Schug Pet. 3 n.2.

In essence, therefore, petitioners are seeking a merely advisory opinion by this Court pertaining to an issue that was not even necessary to the district court's decision in the first place and which, in any event, was effectively mooted by the California Supreme Court just a few days afterwards.

We emphasize that both petitioners' presentations of this case as one concerning "privilege" is misleading. While California Evidence Code Sec. 1157 could be viewed as establishing a form of privilege by implication, the statute in terms refers only to *discovery* of documents. It does not determine whether documents, once discovered, would be admissible as evidence at trial. See *Alexander v. Superior Court*, 5 Cal.4th 1218, 1223 n.4, 23 Cal.Rptr.2d 397, 859 P.2d 96 (1993) ("Evidence Code Sec. 1157 creates only a privilege against discovery from medical staff committees; it does not create a bar against introduction of evidence.") The district court has made no ruling on whether any peer review information, once released to respondents, would be admitted.

Thus, while the state law claims of malpractice do remain in this case, the potential *Jaffee v. Redmond* issue of whether federal "privilege" law would govern their admissibility as to those state claims is not yet ripe for decision. That is because, of course, the district court has not yet had occasion to rule on that question.

This is yet another reason why petitioners' persistence in interlocutory delay of this civil case is so obviously improper. If and when purportedly privileged documents are admitted into evidence in support of respondents' state malpractice claims, and an adverse

judgment is rendered against one or both petitioners, their *Jaffee v. Redmond* questions might at least arguably (without conceding the point) be worthy of certiorari review by this Court.

II.

LEGAL ARGUMENTS FOR DENYING THE WRITS

A. Neither Petition Even Attempts to Argue That Any Novel Issue of Mandamus Law Is Presented By The Ninth Circuit's Unpublished Summary Denial of Writs of Mandamus Against An Interlocutory Discovery Order. The Petitions, In Fact, Demonstrate Effectively, and Thus Concede, That There Is Sufficient Conflicting Authority That The District Court's Discovery Order Cannot Possibly Meet the Abuse of Discretion/Clearly Erroneous Standard for Mandamus Relief.

Petitioners would have this Court leap over the procedural posture of this case and conduct a plenary examination of federal medical "privilege" (discovery) law as though the Ninth Circuit had already done that in a published opinion in a case properly before it on appeal from a final judgment. This, of course, is not the case.

The reason the Ninth Circuit summarily declined petitioners' invitation is the same reason this Court should do so: The district court's opinion is light-years short of the clearly erroneous/abuse of discretion that is necessary for the extraordinary remedy of mandamus to reverse an interlocutory discovery order. Indeed, this Court's strictures against mandamus in such situations

appear to be materially stronger even than those uniformly applied followed by the courts of appeal.

Petitioners cannot escape the decisive threshold issue of mandamus law merely by alleging, as they do, that this Court has jurisdiction of their petitions under the general certiorari statute, 28 U.S.C. Sec. 1254(1), rather than under the separate statute, 28 U.S.C. Sec. 1651, that gives this Court power to issue "all writs necessary or appropriate." Although petitioners are not asking the Supreme Court directly to issue writs of mandamus to the district court, their request for reversal of the Ninth Circuit's summary action is that this Court order the Ninth Circuit to issue those writs of mandamus. That, obviously, is tantamount to the Supreme Court's directly issuing the writs.

It is well settled that this Court will not issue (or order the issuance of) writs of mandamus against interlocutory district court orders absent truly extraordinary circumstances. Orders that are not appealable by reason of their interlocutory nature may not ordinarily be reviewed by mandamus, even though the hardship of a prolonged trial "is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment." *United States Alkali Association v. United States*, 325 U.S. 196, 202 (1945); *Roche v. Evaporated Milk Association*, 319 U.S. 21, 25-32 (1943); *Bankers Life Co. v. Holland*, 346 U.S. 379, 382-83 (1953); *Will v. United States*, 389 U.S. 90, 96-98 (1961); *Parr v. United States*, 351 U.S. 513, 520 (1956). Mandamus writs "are drastic and extraordinary remedies [to be] reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259 (1947); *Will, supra*, 389 U.S. at

106-07. "The power to issue [the writs] is discretionary and it is sparingly exercised." *Parr, supra*, 351 U.S. at 520.

This Court has repeatedly emphasized that mandamus, which can have "the unfortunate consequence of making the [district court] judge a litigant" — as is the case here at least with the Hospitals' petition — should be restricted to extraordinary situations in order to implement the long-standing congressional policy against piecemeal appellate litigation, "particularly in an era of excessively crowded lower court dockets." *Kerr v. United States District Court*, 426 U.S. 394, 402-03 (1976) (unanimously upholding Ninth Circuit's summary denial of petition for writ of mandamus on alleged ground, as here, that district court's discovery order violated purported privilege). To that end, the party seeking the writ must show that his right to it is "clear and indisputable." *Id.*

The Supreme Court has long refused to issue, or order lower courts to issue, writs of mandamus to control or reverse the discretionary acts of district courts. *Ex parte Bradley*, 7 Wall. 364 (1863); *Ex parte Parker*, 120 U.S. 737 (1887). Because the district court was exercising power within its zone of discretion, the Supreme Court more recently went out of its way to *reverse* the issuance of writs of mandamus by courts of appeal in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 659 (1978), and *Allied Chemical Corp. v. Daiflon, Inc.*, 437 U.S. 659 (1978). These cases underscore the important policy against using mandamus and other extraordinary writs as a means to obtain appellate review of non-appealable interlocutory orders.

The Ninth Circuit followed its own case law, which is to similar effect as the foregoing Supreme Court cases, when it summarily refused to overturn the district court's interlocutory discovery by writ of mandamus. It was clear enough even under the Circuit's law that petitioners did not even come close to making a case for the extraordinary relief they sought.

The U.S. Supreme Court's even stronger statements of reluctance to use or order use of the writ adds a further barrier that petitioners cannot possibly overcome. For these petitions to be worthy of Supreme Court consideration, they would have to make a plausible case not merely that the district court was clearly erroneous and abused its discretion in ordering discovery, but that the Ninth Circuit was, itself, clearly erroneous and abused its discretion by not using mandamus to reverse the district court.

Petitioners have not made such showing — on either level of inquiry. Their presentation here and below of the apparent division of authority concerning the legal issue they want this Court to leap to decide constitutes a conclusive admission that their petitions do not present even an arguable case for mandamus to be ordered by this Court after full review.

The Ninth Circuit's order summarily denying mandamus cited, without comment, *Bauman v. United States District Court*, 557 F.2d 650, 654 (9th Cir. 1977), which holds, *inter alia*, that mandamus will not lie unless the district court's decision (a) was "clearly erroneous as a matter of law"; *and* (b) involved an important issue of first impression. Petitioners admit that they cannot satisfy

the first prong of this test, and they come close to admitting that they cannot satisfy the second prong.

Thus petitioners admit there is ample authority, albeit they disagree with it, supporting the district court's refusal to apply the California "privilege" (discovery prohibition) in federal question cases such as this one. This presumptively means the district court's decision cannot have been clearly erroneous as a matter of law. *See* cases discussed in Hospital Pet. 17-18; 20-23 (privilege "has had an ambiguous existence, neither uniformly adopted nor rejected" — at p. 21)) and Schug Pet. 13-16 ("the circuit courts have not treated the medical peer review privilege uniformly" — at p. 13).

Petitioners' presentations of pro and con cases in these sections of their brief are not as even-handed as they appear because the actual weight of federal on the medical peer review privilege tilts substantially further against it than petitioners' skewed case selection suggests. Nevertheless, petitioners have presented enough federal authority contra the privilege to foreclose the argument that the district court's order was clearly erroneous or an abuse of discretion.

Of course, the only reason petitioners were even-handed to any extent was their understandable desire to convince this Court that there is a sufficiently material difference of opinion in the lower courts to warrant Supreme Court review under the "conflict" criterion for certiorari. But, again, they have tried to leap a vast canyon in two successive jumps. The primary issue presented by *this* case, as opposed to the theoretical case

petitioners would like to generate for the Court's consideration, is whether the district court abused its discretion and whether the Ninth Circuit further abused its own discretion in not ruling, by mandamus, that the district court abused its discretion.

Petitioners are apparently correct that none of the published privilege cases to date (the instant district court opinion is unpublished just like the Ninth Circuit's order) has arisen under the particular federal law — EMTALA — at issue here. But that does not indicate that any truly novel issue of first impression is presented that would justify the extraordinary remedy of mandamus. In light of the breadth of federal question cases in which the purported peer review privilege has been discussed — and mostly denied application — no particular novelty or new analysis is required merely because EMTALA is the federal law involved here. Indeed, the claimed privilege under EMTALA is on all fours with a similar privilege claim under another federal statute, the Health Care Quality Improvement Act of 1986, which has been definitively rejected by at least six federal courts (indicated by parenthetical references to HCQIA in case list below).

Under Ninth Circuit authority, the absence of clear legal error was, alone, fatal to their request for mandamus. *Calderon v. United States District Court*, 98 F.3d 1102, 1105 (9th Cir. 1996); *Survival Systems of Whittaker Corp. v. United States District*, 825 F.2d 1416, 1418 n.1 (9th Cir. 1987) (the novelty or first impression test is irrelevant where no showing that court below was clearly erroneous). As Ninth Circuit Judge Dorothy Nelson points out in the leading Ninth Circuit practice guide: "[E]ven in

privilege cases, the court usually will intercede by mandamus only where petitioner can demonstrate clear error. *See Heathman v. United States District Court*, 503 F.2d 1032, 1035 (9th Cir. 1974) (petition denied where no clear error); *In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203, 206 (9th Cir. 1995) . . . " Nelson, Goelz & Watts, *Ninth Circuit Civil Appellate Practice*, Sec. 13:168, p. 13-22.

That the district court's refusal, in this EMTALA case, to accord petitioners the benefit of California's peer review privilege is contrary to no published precedent by itself indicates, under Ninth Circuit authority, that the court's action cannot have been clearly erroneous. *See Wilson v. United States District Court*, 103 F.3d 828, 830 (9th Cir. 1996). Particularly when there is no contrary Ninth Circuit authority, and the ruling is consistent with decisions in other circuits, as the district court's was, the clear error standard cannot be met. *King v. United States District Court*, 16 F.3d 992, 993 (9th Cir. 1994).

While petitioners' effective admissions that the district court's order was neither an abuse of discretion nor clearly erroneous should be sufficient to foreclose mandamus and thus require denial of certiorari, we emphasize that petitioners' briefs present a misleading impression that the weight of legal authority pro and contra their position is more or less the same. In fact, federal privilege law is overwhelmingly hostile in general to new privileges not recognized as part of the common law in the original draft of the Federal Rules of Evidence and, specifically, to the purported peer review privilege.

In *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 110 S.Ct. 577 (1990),

a *unanimous* Supreme Court refused to recognize a state law peer review privilege with regard to university faculty evaluations. The Court strongly reiterated the long-standing rule that privileges are disfavored in federal practice, and that any privilege must be strictly construed, because "testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' " 493 U.S. at 189.

The Court considered all the arguments that petitioners here present, *i.e.*, that their interest in protecting the confidentiality of sensitive peer review materials outweighs plaintiffs' need for the evidence, that the evidence sought can be obtained through other means, that doctors (professors there) have relied on the privilege, and that it is unlikely they would honestly evaluate their colleagues in its absence. *Id.* at 192-93. The Court acknowledged that these concerns have some merit, but bluntly decided that the federal interest in remedying discrimination, and revealing evidence related to that purpose, is more important. *Id.*

Similarly, Congress' concern, under EMTALA, to curtail abuse of patients at hospital emergency rooms also is presumptively more important. Indeed, this Court was concerned that acceptance of the peer review privilege for faculty evaluations "would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society," *id.* at 585 — a group that obviously includes hospitals and doctors.

That Supreme Court decision both reflects, and further encourages, the overwhelming tide of federal court hostility to recognition both of the medical peer review privilege specifically and, generally, of new privileges that were unknown to prior federal common law but which were sought to be imported from state law or even from general legal scholarship. This true picture of the landscape of the case law refutes petitioners' hyperbolic rhetoric that the district court's unpublished order here has caused some *sui generis* breach in the sanctity of a universally-recognized (all 50 states, as both put it) peer review privilege that doctors have, supposedly, long comfortably counted upon to exist and be enforced.

A partial list of federal cases refusing to apply the medical peer review privilege to bar discovery follows. (Cases, referred to above, that refuse to recognize the peer review privilege under the Health Care Quality Improvements of Act of 1996, a federal statute on all fours with EMTALA, are noted in parentheticals as "HCQUIA.") *Wei v. Bodner*, 127 F.R.D. 91 (D.N.J. 1989), (HCQUIA case); *Robertston v. Neuromedical Center*, 169 F.R.D. 80 (M.D. La. 1996) (HCQUIA); *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993) (HCQUIA); *LeMasters v. Christ Hospital*, 791 F.Supp. 188, 191 (S.D. Ohio 1986) (HCQUIA); *Manthe v. Vanbolden*, 133 F.R.D. 497 (N.D. Tex. 1991) (HCQUIA); *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991) (HCQUIA); *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979); *Ott v. St. Luke Hospital*, 522 F.Supp. 706 (E.D. Ky. 1981); *Todd v. South Jersey Hospital System*, 152 F.R.D. 676, 683 (D.N.J. 1993); *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1062-63 (7th Cir. 1981); *United States v. Illinois*,

148 F.R.D. 587, 588-89 (N.D. Ill. 1993); *Smith v. Alice Peck Day Memorial Hospital*, 148 F.R.D. 51, 56 (D.N.H. 1993); *Jiricko v. Coffeyville Memorial Hospital Medical Center*, 700 F.Supp. 1559, 1564 (D. Kan. 1988); *Doe v. St. Joseph's Hospital*, 133 F.R.D. 677, 680 (N.D. Ind. 1987); *Quinn v. Kent General Hospital*, 617 F.Supp. 1226, 1245 (D. De. 1985); *Schafer v. Parkview Memorial Hospital*, 593 F.Supp. 61, 65 (N.D. Ind. 1984); *Dorsten v. Lapeer County General Hospital*, 88 F.R.D. 583, 586 (E.D. Mich. 1980).[1]

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[1] A similar tide of federal authority has rejected federal application of state privileges in cases other than medical peer review. A by no means exhaustive list includes: *United States v. Wilson*, 960 F.2d 48, 50 (7th Cir. 1992) (refusing to apply state unemployment claims privilege); *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993) (no to state privilege for votes on academic promotions); *In re International Horizons, Inc.*, 689 F.2d 996, 1004-05 (11th Cir. 1982) (no to state accountant-client privilege); *FTC v. TRW*, 628 F.2d 207, 210 (D.C. Cir. 1980) (no to self evaluation privilege against federal agency subpoena); *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (no to state medical peer review privilege; *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (no to state doctor/patient privilege); *United States v. One Parcel of Property Located at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (no to state privilege re erased arrest records); *Sexton v. Poole Truck Lines, Inc.*, 888 F.Supp. 127 (M.D. Ala. 1994) (no to state privilege re sealed driving records); *Equal Employment Opportunity Commission v. Illinois Dep't of Employment Security*, 995 F.2d 106, 109 (7th Cir. 1993) (no to state privilege re unemployment hearings); *Linde Thomason Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corporation*, 5 F.3d 1508, 1514-15 (D.C. Cir. 1993) (no to state insured-insurer privilege); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992) (no to state privilege for safety review meetings).

To be sure, petitioners here, as below, purport to rely upon some of these same cases by attempting to distinguish them as being only *apparently* adverse authority. Their theory is that in listed cases where the gravamen was not, at least directly, improper patient care — *e.g.*, antitrust or discrimination cases — discovery notwithstanding the state peer review privilege could be justified because these purported violations happened "in" the peer review process itself, as opposed to the violations merely being analyzed by the peer review process.

This argument is unpersuasive for two reasons. First, regardless of the purported distinction, the upshot is that court after court has ordered discovery of peer review information. No matter what the theory, such discovery obviously is so common that no reasonable doctor could truly have relied on the supposed immunity from discovery of peer review records. Yet this frequent knowledge and fact of discovery has not caused the medical care system to collapse as the petitions say will happen because of the discovery ordered in this case.

Second, as we showed in the Statement of the Case, the purported distinction between those cases and the instant case does not actually exist. Or, even if it does arguably exist, that issue is not fit for review by the Supreme Court.

The *primary* ground for the district court's order, as we explained, was that sufficient evidence supported plaintiff's contention that relevant misconduct *did* happen "in" the peer review process itself. That alone takes the case out of the fact pattern petitioners have invented in their attempt to obtain certiorari. (That pattern, again, is

one where the peer review records contain nothing more than straight commentary by doctors about each other's performance). This determination by the district court was based upon its knowledge of the record in this case, which is a matter especially within its zone of discretion. It probably would not be appropriate for Supreme Court review even on a properly presented appeal after final judgment. It *certainly* is not appropriate for Supreme Court intervention on an interlocutory basis.

B. There Is *No* Intercircuit Split On the Question Whether A Party Who is Not the Target of Discovery In a Civil Case Has The Right to Automatic Appeal Of An Interlocutory Discovery Order Directed At Another Party, Particularly Where the Other Party Is Able and Motivated to Contest the Discovery Order Itself, Whether By Petition for Mandamus, as Has Already Occurred Here, Or Subsequently By Suffering Contempt and Then Appealing the Contempt Ruling.

Although the Hospitals' and Schug's petitions for mandamus were and are unmeritorious, defendants were entitled to bring them and to make their arguments to the Ninth Circuit and to the Supreme Court. Those petitions did not halt all progress in the litigation of the civil suit in the district court. Although the Ninth Circuit issued a stay, which remains in effect, of the order for discovery of the peer review records, that did not prevent any other case proceedings from going forward in the district court.

But Schug's separate appeal was fraudulent misconduct from the beginning, which has now been exacerbated by a fraudulent presentation to this Court of an entirely nonexistent "intercircuit split" in the authority applicable to interlocutory appeals of discovery orders in civil cases. This improper appeal had, and continues to have, precisely the devastating "freezing" effect on the entire civil case, prevention of which is the underlying rationale for the important statutory and case law policy against piecemeal interlocutory appeals. The appeal, unlike the mandamus petitions, caused the case file to be transferred from the district court to the Ninth Circuit, thereby depriving the district court of jurisdiction to move the case forward through remaining motions to a trial date. This freeze has lasted for a year now, and will continue while the certiorari petition as to the appeal is pending.

28 U.S.C. Sec. 1291 gives the courts of appeal jurisdiction over appeals solely from final decisions of district courts, which do not include interlocutory discovery orders. Section 1292(b), however, provides a discretionary avenue to obtain immediate appellate relief from an allegedly oppressive discovery (or other) order: Asking the district court to certify the order for immediate appeal.

Schug omits from his fact statement the crucial information that his trial court law firm did file a motion, including memorandum of law, on June 1, 1998 for Sec. 1292(b) certification of the district court's order. *See* excerpt from district court docket sheet, attached hereto as App. A. However, the attorney in the firm who filed those papers apparently was unaware that a different

attorney in the firm had been told by the district judge at a status conference three days earlier that if such motion were presented, the court would not be inclined to grant it. *See* declaration of respondents' counsel, attached hereto as App. B. This information induced Schug's counsel on June 4, 1998 to withdraw the motion for Sec. 1292(b) certification. *See* App. A.

But instead of the withdrawal's terminating interlocutory appellate proceeding in this case, Schug's counsel, despite obvious awareness that discretionary certification was the proper and sole remedy for immediate relief, replaced their certification motion with a notice of appeal as of right under Sec. 1291. *See* App. A (entry for June 3, 1998). They persist in that improper venture to this very day.

Not a single case cited in Schug's petition (pp. 21-26) supports the theory that a party in a *civil* case has a right to automatic interlocutory of a discovery order that supposedly affects him, but which is directed at another party in the same case who holds the documents and other information sought. Moreover, such interlocutory appeal is particularly inappropriate where, as here, the other party is fully motivated to contest the order and is indeed vigorously contesting the order. Such an appeal, which violates basic black letter federal doctrine against piecemeal appeals, is not supported by *Perlman v. United States*, 247 U.S. 7 (1918), or any other authority.

The Ninth Circuit summarily dismissed the appeal based on its own prior authority, *In re National Mortgage*

Equity Corp., 857 F.2d 1238 (9th Cir. 1988), which explained why neither *Perlman* nor any other case supports a right to appeal a civil discovery order in that situation. This Ninth Circuit decision, however, broke no new ground nor is it contrary to any case from any other circuit.

The Ninth Circuit explained that it, like the Supreme Court and some other circuits, had previously permitted interlocutory appeals by parties who claimed potential adverse impact of disclosures by a third party, one *not* a party to any ongoing civil case, who had been served with a grand jury subpoena. 857 F.2d at 1240, citing *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (9th Cir. 1983); *In re Grand Jury Subpoena Duces Tecum (Marger)*, 695 F.2d 363 (9th Cir. 1982); *In re Gren*, 633 F.2d 825 (9th Cir. 1980); *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969).

The Ninth Circuit also cited, and endorsed, a different basis for immediate appeal "where the aggrieved party's motion or petition is the only pending proceeding in any federal court," a situation that, of course, does not exist where that party opposes a discovery order directed at another party in an ongoing civil case. *See* 857 F.2d at 1240, citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 514 (1975) (motion in district court to quash U.S. Senate subpoena directed at third party); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356 (1931) (no criminal case pending when motion was made); *Burdeau v. Powell*, 256 U.S. 465 (1921) (same); and several other cases to the same effect.

The Ninth Circuit's opinion cast no doubt on the viability of all these cases as applications of the so-called *Perlman* exception to non-appealability of interlocutory discovery orders or subpoenas, contrary to Schug's preposterous claim that the opinion construes the exception so narrowly that it "essentially eliminates" it. (Schug Pet. 22.) Rather, the Ninth Circuit correctly explained that a case like the instant one is fundamentally different:

> "The reason for allowing [interlocutory] review of such orders in the grand jury context is that there are aspects of independence from the main course of any prosecution that render the order collateral. . . . We are persuaded that any aspect of independence is lost in an ongoing civil case where a party is aggrieved by a district court discovery order. The essential character of any litigation over a discovery order and the circumstances under which the order is issued, as in this case, render it merely a step in the civil proceeding." 857 F.2d at 1240.

All the cases cited in Schug's petition, from every circuit, are entirely consistent with the Ninth Circuit's endorsement of immediate appealability (the "*Perlman* exception") in the instances described, while recognizing that its rationale does not extend to discovery orders directed at civil litigation parties. The most thorough explanations are two First and Second Circuit opinions that Schug cites for some peculiar reason, even though they definitively reject his precise argument for automatic right of appeal.

In *Corporacion Insular De Seguros v. Garcia*, 876 F.2d 254 (1st Cir. 1989), the court explains why it *rejected* a party's claim that the *Perlman* case gave him the right to

appeal a discovery order directed at another party. *Id.* at 258-59. The First Circuit relied upon Judge Friendly's opinion in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 178 (2d Cir. 1979), the other case cited by Schug.

Judge Friendly gave perhaps the most thorough explanation extant of why the *Perlman* case has nothing to do with discovery orders in civil cases. The point is very simple, but Schug muddles it by making a crucial error in describing the key facts in *Perlman*.

Schug's petition claims the grand jury subpoena to which Mr. Perlman objected was directed at his "bookkeeper." Schug Pet. 22. The implication is that even though the bookkeeper was not a party to ongoing civil litigation, the situation was sufficiently similar to the relationship between doctor and hospital that if Perlman could take an interlocutory appeal, despite that he was not the target, then so should Schug.

But the subpoena was *not* directed at Perlman's "bookkeeper"! Rather, it was directed at the clerk of the U.S. District Court in New York who was holding some sensitive documents of Perlman's company that had been exhibits in a prior proceeding. 247 U.S. at 8-10. *The whole point of the Perlman case was that a subpoena directed to such a completely uninvolved and obviously unmotivated and disinterested third party created a special situation because such person would have no wish or motive to contest it on behalf of the party who might be injured by the disclosure.* That is why the First Circuit in *Corporacion Insular*, and Judge Friendly in *National Super Spuds*, distinguished *Perlman* "as a 'unique case' in which there was no relation between the

holder of the privilege (Perlman) and the target of the court's order (the clerk of the district court)." 876 F.2d at 259; 591 F.2d at 180.[2]

In sharp contrast, where a relationship — whether of employment, self-interest, or otherwise — does exist, the target of the subpoena "may reasonably be expected to risk a contempt citation in order to preserve both his own and his employer's right to appellate review of their joint claim of privilege." 876 F.2d at 260. Judge Friendly expounded at greater length to the same effect. *See* 591 F.2d at 179-180.

These opinions, though they do not cite it, were in fact following the Supreme Court's decision in *United States v. Ryan*, 402 U.S. 530 (1971). This Court explained that the basic rationale of *Perlman* was that "the custodian [of Perlman's records] could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." *Id.* at 533.

That situation is so far removed from the instant case as to render Schug's petition on the appeal simply absurd. It would be difficult to imagine a more motivated and effective subpoena or discovery order target, both in theory and in fact, than the Hospital petitioners herein. In theory, because they obviously have an even broader and

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[2] The court in *Corporacion Insular* also explains why Schug's citation to *Nixon v. Sirica*, 487 F.2d 700, 707 (D.C. Cir. 1973), is irrelevant. The reason, of course, is the obvious one: "But *Nixon* was a unique case, and we do not believe that the court meant to extend it to any government official other than the President himself." 876 F.2d at 257, citing *In re Attorney General of the United States*, 596 F.2d 58, 62 (2d Cir. 1979).

more profound claimed interest than Schug in the confidentiality of their records. He alleges potential embarrassment to himself alone. But no matter how bad that might be, it hardly can compare with the Hospital's sweeping claim that discovery will destroy the entire system of peer review that it alleges is fundamental to its services.

The Hospital also is motivated and effective *in fact* because it has indeed vigorously pursued its mandamus petition, sparing no effort or legal expense. Whether it will suffer contempt in order to obtain further appellate review (on a *legitimate* basis this time) remains to be seen. But Dr. Schug cannot plausibly say that the Hospital is less than fully motivated and capable of doing so.

All of Schug's remaining citations similarly fail to support either his substantive argument or his argument for certiorari based on purported intercircuit conflict. We dispose of them briefly.

Boughton v. Cotter Corp., 10 F.3d 746 (10th Cir. 1993), is perhaps Schug's strangest citation because its flat rejection of interlocutory appeal of the discovery order in that civil case is entirely consistent with the Ninth Circuit's same holding in *In re National Mortgage Equity Corp., supra*, and thus in the instant case as well. The courts cite numerous other cases, also consistent with the Ninth Circuit, noting that "in virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take [appellate] jurisdiction." 10 F.3d at 749-50.

Even more remarkably, the Tenth Circuit in *Boughton* delivers the coup de grace to Schug's misconceived theory that the *Perlman* exception permits his immediate appeal. The court observed that defendants there did "not [even] rely on *Perlman* and deny application of these [grand jury subpoena cases], arguing that they involve grand jury criminal investigations"! *Id.* at 749-50 n.2. Schug's attorneys should have had the integrity to take the same position instead of vainly pursuing their improper appeal.

In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir. 1979), was not only a grand jury case just like those distinguished by the Ninth Circuit, and every other circuit, from ongoing civil litigation, but the privilege, even if it had once existed, had been effectively waived. *In re Faltico*, 561 F.2d 109 (8th Cir. 1977), similarly involved a grand jury subpoena directed at a non-party "who could not be expected to expose himself to the penalty of contempt in order to obtain appellate review," precisely because his non-party status gave him no particular stake in the litigation or interest in the aggrieved party's complaint about the discovery. *Schwimmer v. United States*, 232 F.2d 855, 860 (8th Cir. 1956), was by Schug's own description a similar grand jury subpoena directed at non-party with no interest in resisting it. Similarly, all the cases cited in footnotes 30, 31, 32, and 36 of Schug's petition (p. 24) are also grand jury subpoena cases, are entirely consistent with the Ninth Circuit's decision on which dismissal of the instant appeal was based, and are thus irrelevant because they establish no "intercircuit conflict."

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The subpoena in *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965), was indeed issued in a civil case, but it went to a non-party witness. Schug overlooks that this makes that case quite different from the instant case. The non-party target of the subpoena there was the very one who brought the appeal, unlike Schug who claims the right to appeal even though he is *not* the target of the discovery. *Id.* at 996. It was the combination of being both a non-party and the target that created the right to appeal: "The appellants, as nonparties to the main suit, will have no right to appeal from a judgment therein. The trial court's order [will be] final as to these appellants." *Id.*

Finally, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 877-78 (5th Cir. 1981), is irrelevant because it involved the distinguishable situation of the Government's special right to interlocutory appeal in some discovery contexts.

Accordingly, the law on the appeal matter is settled, it is consistent throughout the nation, there certainly is no "intercircuit conflict," and Schug's argument in this part of his petition is utterly without merit, either as to worthiness for certiorari or as to legal substance.

III.

CONCLUSION

For the reasons given above, the petitions for certiorari should be denied.

Dated: May 5, 1999

Respectfully submitted,

LAW OFFICES OF JAMES BRADEN

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(415) 398-6865
Counsel for Respondents

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID BURROWS, et al. Plaintiff(s), (Petitioner) v. REDBUD COMMUNITY HOSPITAL DIST., et al. Defendant(s), (Respondent)	Court of Appeals Docket No. 98-70610 Docket Number(s) of Court of Appeals Companion and/or Cross Appeals (if known) 98-70616 District Court Docket Number C 96-4345 SI Date Transcript(s) Filed: no transcripts designated

CERTIFICATE OF RECORD

This certificate is submitted in conformance with Rule 11-2 of the Local Rules of the U.S. Court of Appeals for the Ninth Circuit. The record on appeal, consisting of the trial transcript (if any) and the trial court clerk's record, is ready for the purposes of the appeal. This record is available in the Clerk's Office of the U.S. District Court identified below.

The documents comprising the trial court clerk's record have been numbered in conformance with Rule 11(b) of the Federal Rules of Appellate Procedure. These document numbers are reflected on the U.S. District Court docket sheet and should be used for reference purposes in the briefs.

The actual filing date for this document in the U.S. Court of Appeals will initiate the briefing schedule in civil cases (including habeas corpus cases). All parties in civil cases will receive separate notification of this filing date. In criminal cases, the briefing schedule is set by a Time Schedule Order from the U.S. Court of Appeals.

DATED: July 16, 1998

Office of the
Clerk
U.S. District Court
Northern District of
California
450 Golden Gate
Ave., Box 36060
San Francisco, CA 94102

RICHARD W. WIEKING
CLERK

/s/ Cora G. Delfin

by: Cora Delfin
Deputy Clerk

Proceedings include all events.
3:96cv4345 Burrows, et al. v. Redbud Community Hos, et al.

APPEAL

6/1/98 161 ***NOTICE by defendant Dr. Wolfgang Schug's request for certification of order for appeal. [3:96-cv-04345] (cgd) [Entry date 06/03/98]***

6/1/98 162 ***MEMORANDUM OF POINTS AND AUTHORITIES by defendant Wolfgang Schug in support of notice [161-1] [3:96-cv-04345] (cgd) [Entry date 06/03/98]***

6/3/98 163 LETTER dated 6/1/98 from John S. Gilmore for Adventist Health Inc in response to letter from plaintiff's counsel dated 5/26/98. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/3/98 164 LETTER dated 6/2/98 from Redbud Community Hospital District in response by plaintiff's attorney, Richard Massa dated 5/26/98. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/3/98 165 MINUTES: (C/R N/A) (Hearing date: 5.29.98) Further case management conference – Held. Motion for leave to file amended complaint – Submitted. Discovery cutoff extended to 7/24/98; Expert Discovery cutoff extended to 6/26/98. Motion for leave granted and plaintiff to file amended complaint next week; request for order shortening time submitted; Defendants to respond to submitted letter not later than 6/2/98. Court to issue order re 1157 issues; Defendants request for one

[Boldface emphasis added by respondents]

week continuance for expert disclosure granted. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/3/98 171 NOTICE OF APPEAL by defendant Wolfgang Schug, M.D., defendant JJ&R Emergency Mgmt (sued erroneously as Emergency Medical Management Services, Inc. from Dist. Court decision order dated 5/5/98 [154-1] Fee status Paid, $105.00, receipt no. 131499. [3:96-cv-04345] (cgd) [Entry date 06/08/98]

6/4/98 166 LETTER dated 6/1/98 from Richard J. Massa re possible use of jury instructions discussed at the case mgmt conf. on 5/29/98. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 167 LETTER dated 6/2/98 from Matthew P. Miller re discovery disputes. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 168 LETTER dated 6/3/98 from Sonja M. Dahl to Mr. Massa. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 169 LETTER dated 6/4/98 from Thomas J. Donnelly for Redbud Community Hospital re a petition for writ be filed with the Appellate Court regarding the Evidence Code 1157 issues. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 170 NOTICE by defendant of withdrawal of request for certification. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

Docket as of July 16, 1998 11:47 a.m.

[Boldface emphasis added by respondents]

APPENDIX B

MASSA & ASSOCIATES

Attorneys At Law
120 North Forbes Street
Lakeport, California 95453

Telephone: (707) 262-0230
Fax: (707) 262-1028

January 15, 1999

DECLARATION OF RICHARD J. MASSA

I, RICHARD J. MASSA, declare:

I am an attorney at law admitted to practice before the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals, am the attorney of record and primarily responsible for filing, preparation and trial of the case of *Burrows, et al., v. Redbud Hospital, et al.*, No. C-96-4345 SI, in the United States District Court, Northern District of California.

I have been personally present at every hearing and conference held on this matter in the trial court, specifically including the Case Management Conference of May 29, 1998, held before the Honorable Susan Illston, District Judge.

At no time during the May 29, 1998, Case Management Conference, or at any other time, in my presence or to my knowledge, did Judge Illston "instruct" defendant SCHUG, et al., or counsel for defendant SCHUG, et al., to "withdraw" a request for certification of any order for appeal.

With regard to the Case Management Conference held in this matter on May 29, 1998, the only relevant

comment of Judge Illston with regard to this matter that declarant recalls was to the effect that if a request for certification were to be made, the Court would not be inclined to grant such a request.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: January 15, 1999 /s/ Richard J. Massa
RICHARD J. MASSA